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September 25, 2002

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FEDERAL COMMUNICATIONS COMMISSION
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Via hand delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket Nos. 01-338 and 02-33

Dear Ms. Dortch:

On September 24, 2002, Charles Hoffman, Chief Executive Officer, Anjali Joshi, Executive Vice President, Brad Sonnenberg, General Counsel, Susan Jin Davis, Praveen Goyal, and Jason Oxman, all of Covad Communications, met with Commissioner Kevin Martin, Dan Gonzalez, and Emily Willeford, his Legal Advisors, to discuss the Triennial Review and Broadband proceedings. Covad's points are summarized in the attached presentations.

Respectfully submitted,

Florence Grasso

Cc: Commissioner Kevin Martin
Dan Gonzalez
Emily Willeford

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The Law and Policy of Linesharing

Brad Sonnenberg

Senior Vice President
and General Counsel

September 24, 2002

Overview of Covad's *Triennial Review* advocacy

- No evidence on the record of changes in circumstances since the *UNE Remand Order* that support eliminating transmission UNEs.
- **Loops** are still bottlenecks, cannot be economically or technically duplicated, regardless of what service is offered over the loops, or what material the loops are made of. Nothing on the record supports any changes to the Commission's current loop rules.
- **Lineshared loops** are still the only way to serve the consumer DSL market. Nothing on the record challenges the economic or technical impossibility of serving consumers over stand-alone loops. No legal argument on the record that CLECs are not impaired without lineshared loops.
- **Interoffice transport** is not available from alternate providers. Collocated fiber providers link COs with downtown office buildings, not other COs. No evidence on the record that COs are linked to one another by CLECs.
- **OSS** is vital for pre-order loop makeup info, ordering, provisioning, billing, repair. Nothing on the record supports eliminating OSS.

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ILECs have introduced no evidence on the record of changes in circumstances since the adoption of linesharing in 1999 that could support elimination of the linesharing UNE.

- In the absence of that record support, the Commission cannot eliminate linesharing.
- "It is axiomatic that an agency choosing to alter its regulatory course "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C.Cir.1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971); accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)."
- "Revocation constitutes a reversal of the agency's former views as to the proper course.... In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption ... is not against ... regulation, but against changes in current policy that are not justified by the rulemaking record." Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)

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CLECs are still impaired without access to lineshared loops

- The Commission's conclusions underlying the adoption of linesharing are not challenged on the record in the Triennial Review.
- "Carriers seeking to deploy voice-compatible xDSL-based services cannot self-provision loops." Linesharing Order at para. 37.
 - CLECs still cannot duplicate the ILECs' nationwide loop plant.
- "Requiring that competitors provide both voice and xDSL services, or none at all, effectively binds together two distinct services that are otherwise technologically distinct. Such bundling . . . will drive investment away from the provision of advanced services." Linesharing Order at para. 56.
 - Particularly in this capital environment, DSL providers cannot afford the hundreds of millions of dollars needed to deploy nationwide voice architectures.
- No BOC submitted a supportable claim on the record to be suffering economic harm or deterred from innovation because of unbundling of lineshared loops.

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Verizon mounts the only serious challenge to linesharing unbundling, and its arguments are without merit.

1. Verizon claims that linesharing is not a "network element" because the high frequency portion of the loop is not a "dedicated facility." Verizon Comments at 82.
 - But network element definition is not limited to "dedicated" facility" -- rather, definition includes "facility or equipment" as well as "features, functions, and capabilities that are provided by means of such facility or equipment." Thus, the frequencies of the loop are features, functions, and capabilities of the loop, and thus are included within the definition of a network element.
2. CLECs are not impaired without access to linesharing, because cable modems, satellite, and wireless "provide the same functionality to consumers" as DSL and thus "constitute precisely the type of facilities available outside of the incumbent's network" that bars the Commission from unbundling lineshared loops. Verizon Comments at 83.
 - As described earlier, Covad DSL is a superior service to alternative broadband retail offerings, and is superior to BOC retail DSL. Consumers benefit from the technical and price superiority of Covad's DSL offerings. In addition, cable modem and other alternative facilities are not available to Covad, and thus Covad is still "impaired" within the meaning of the statute without access to lineshared loops.

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Verizon linesharing arguments, continued

3. ILECs are "new entrants and relatively minor players in this market" and thus the Commission "cannot compel access" to ILEC loops for broadband CLECs. Verizon Comments at 84.
 - The ILECs are not "new entrants" as to local loop plant, and are certainly not "minor players" as to their control of those bottleneck facilities. The issue of the ILECs' share of the customer base of retail broadband services is not relevant to the question of whether CLECs are impaired without access to loops in their ability to provide telecommunications services. ILECs control bottleneck loop facilities, and absent access to those facilities, CLECs are impaired.
 - Mere existence of cable modem services does not change bottleneck nature of loops.
4. Imposing an unbundling obligation "would jeopardize the continued viability of [broadband] competition." Verizon Comments at 84.
 - To the contrary, the linesharing obligation has led to an explosion in broadband competition. Verizon introduces no evidence that its obligation to unbundle loops deters competition.

Verizon linesharing arguments, continued.

5. Eliminating linesharing simply puts the ILEC and the CLEC in "precisely the same position" because both carriers must provide voice and data over the same line in order to serve customers. Verizon Comments at 85.
 - Covad is not in the same position as Verizon as to loops -- Verizon owns the loop plant by virtue of a government grant of monopoly and funded its network construction through a captive ratepayer base. Verizon still has 92% of the voice market, and can fund its DSL deployment because the customers pay for the full loop. Covad would have to win the voice customer from Verizon before Covad could offer DSL, thus forcing Covad to enter a market in which it has no expertise, and no reasonable prospect of winning sufficient customers to succeed.
6. Linesharing is "inconsistent with the Act's goal of promoting facilities-based competition" because linesharing "unquestionably discourages CLECs from investing both in their own advanced services facilities and in facilities used to provide competitive telephony services." Verizon Comments at 86.
 - Covad and other DSL providers would not, and could not, invest in their own loop plant to serve residential DSL customers, and thus the unbundling of the loop plant in no way deters facilities investment. With the exception of the UNE transmission facilities, Covad's network is already facilities based.

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Verizon linesharing arguments, continued

7. Linesharing "degrades the ultimate performance and reach of the physical links." Verizon Comments at 86.
 - Exactly the opposite is true - linesharing enhances the performance of existing loops by utilizing the upper frequencies. ADSL was designed to operate in a linesharing environment, and other than this conclusory statement, Verizon offers no specific evidence of degradation, as it cannot.
8. Linesharing "indisputably reduces the ILECs' incentives to upgrade their networks." Verizon Comments at 86.
 - Verizon introduces no evidence in support of its claim that the loop unbundling obligation deters Verizon from upgrading its copper loop plant. Verizon erroneously applies its argument about facilities that may be available on the open market (switches, e.g.) to loops.

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The Commission's tentative conclusions in the Broadband NPRM, if adopted, do not bar the Commission from continuing to require the unbundling of lineshared loops.



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In the first instance, the Broadband NPRM is unnecessary and creates uncertainty.

- The Commission should not adopt its tentative conclusions, because of the legion of consequences (intended or unintended) that flow from it.
 - Opposition from the states, the Department of Defense, Department of Justice, GSA, Small Business Administration, disabilities community, among others.
- Section 10 forbearance authority is exactly how Congress intended the Commission to eliminate rules that are no longer necessary -- the Commission should simply forbear here.
- Section 10 forbearance would provide all of the relief that the Bells have asked for in this proceeding, except unbundling relief, which should be granted (if at all) in the Triennial Review, not this proceeding.

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Even if the Commission adopts its tentative conclusions, linesharing can still be preserved.

- Primary question asked in the Broadband NPRM: "We analyze whether wireline broadband Internet access service provided over the provider's own facilities is an information service, a telecommunications service, or both." Wireline Broadband NPRM at ¶ 24.
 - FCC inquiry appears to be into retail services offered by the companies that own their own loop facilities -- i.e., the Bells. But there could be unintended consequences of this conclusion.
- Three possible service classifications under the 1996 Act:
 - (1) telecommunications – a transmission pathway (DSL, ATM, frame relay, T-1, POTS service)
 - (2) telecommunications service – telecommunications, provided to the public or such class of users as to constitute the public, for a fee.
 - (3) information service: telecommunications + computer-generated information, such as provided by an ISP. In other words, telecommunications + ISP = information service

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Tentative conclusion that BOC retail DSL services are information services does not apply to Covad retail DSL services.

- "Applying this statutory framework, we tentatively conclude that providers of wireline broadband Internet access service offer more than a transparent transmission path to end-users and offer enhanced capabilities. Thus, we tentatively conclude that this service is properly classified as an "information service" under section 3 of the Act. We base this tentative conclusion on the fact that providers of wireline broadband Internet access provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition. For example, in the case where a wireline broadband Internet access service allows end-users to retrieve files from the World Wide Web, an end-user must have the capability to interact with information stored on the facilities of the provider of the wireline broadband Internet access service." NPRM at paragraphs 20-21.
 - In other words, BOC DSL services are information services, because they are a combination of telecommunications + ISP services.
- The Commission's tentative conclusion applies to BOC DSL services only, not CLEC DSL services, because CLEC DSL is a transmission service provided on a common carrier basis to dozens of other carriers and ISPs.
 - The Commission would conclude that BOC DSL services are not common carrier services (i.e. not telecommunications services), because they are provided on a private carriage basis only to themselves.

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Covad's DSL transmission service is still a telecommunications service.

- "In addition, we tentatively conclude that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service." Wireline Broadband NPRM at 17.
- In short, this tentative conclusion applies to carriers that provide broadband over (a) last mile facilities that the carrier owns, and (b) do not provide such services to the public (and thus do not provide a "telecommunications service").
- Neither (a) nor (b) applies to Covad, which (a) leases the last mile, but does not own its own facilities, and (b) provides broadband to the public (ISPs, other carriers, and end users).

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Classification of BOC retail DSL services as information services does not mean the retail services Covad provides are information services.

- When a carrier provides DSL transport service to an ISP it is providing a regulated, basic telecommunications service. This is true whether or not the entity providing the service is an ILEC or CLEC, or even whether the ISP is an integrated, affiliated, or unaffiliated ISP. In this scenario, the ISP is a consumer of DSL service. That ISP then provides internet access over DSL to the end-user. The service provisioned to the end-user by the ISP is a non-regulated enhanced information service.
 - BOC retail DSL is: DSL transmission service (telecommunications) + BOC ISP service = information service. BOC DSL transmission input is telecommunications, not a telecommunications service, if BOC is not offering its DSL directly to the public. BOC offering of DSL to 1 or 2 ISPs may be classified as private carriage.
 - Covad DSL is: transmission service offered to the public, such as to ISPs (both Covad.net and independent ISPs), end users, and other carriers = telecommunications service.

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Commission precedent holds that DSL transmission services are telecommunications services.

- The Commission has concluded on numerous occasions that DSL services, provided on a common carrier basis, without the ISP component, are telecommunications services. Commission has already concluded that DSL services, provided to ISPs, are telecommunications services:
 - Example: "Moreover, we agree with NTIA that although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services." Advanced Services Resale Order, CC Docket No. 98-147, FCC 99-330 at 21.
- Broadband NPRM recognizes this precedent and notes "our prior conclusion that an entity is providing a "telecommunications service" to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service." Broadband NPRM at 26.
- Commission reached the same conclusion in Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, para. 35 (1998) (finding that advanced services such as xDSL constitute telecommunications services when offered to the public directly or on a stand-alone basis).

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Linesharing is still a UNE, even if BOC retail DSL is an information service.

- Section 151 of the Act defines "network elements" as including "facilities used in the provision of a telecommunications service." Classification of ILEC DSL transmission input as "telecommunications" and not "telecommunications service" does not prevent unbundling of loops used to provide broadband services, because loops are still "used in the provision of" telecommunications services, like POTS, T-1, DSL offered as a telecommunications service by CLECs, etc. This is true of the upper frequencies of loops as well, which can be used to provide a telecommunications service, regardless of whether the BOCs choose to or not.
- Section 151 also includes in the definition of network elements all of the "features, functions, and capabilities" of the loop. This includes frequencies of the loop, specifically the upper frequencies. Thus, so long as the loop itself is a UNE, the features, functions, and capabilities of that loop (including its frequencies) fall within the definition of the loop UNE.

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Section 251(c)(3) is also satisfied by linesharing unbundling, regardless of the classification of BOC retail DSL services.

- Section 251(c)(3) permits CLECs to access UNEs to provide a "telecommunications service." FCC must classify CLEC DSL services as "telecommunications services" in order to preserve section 251(c)(3) access to UNEs. Covad's broadband offerings are clearly telecommunications services, because they are offered on a common carrier basis.
- Classification of BOC retail DSL services cannot be permitted to dictate classification of CLEC DSL services. If it were otherwise, Covad could only purchase a loop that was already being used to offer a telecommunications service, not an idle loop, and could only purchase a loop being used to provide the same telecommunications service as Covad provides.
- The Act does not require the unbundling of only those network elements that the ILECs actually use to provide telecommunications services. If that were the case, all CLECs would be mere mirrors of the ILECs - CLECs would only be entitled to provide the exact same retail services as the ILECs. This unbundling obligation is not eliminated for CLEC customers who use elements to provide services different from those provided by the ILECs, or to provide service differently than the ILEC provides service.

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Even where Covad sells DSL transmission service to its own ISP, linesharing is still a UNE.

- When carriers, such as Covad, offer transport using DSL-based technologies, those transport services constitute "telecommunications."
- When that carrier provides this telecommunications capability to ISPs or to end users (in other words, to the public), the carrier is providing a telecommunications service.
- The conclusion does not vary if the ISP is affiliated with the CLEC, so long as the carrier offers service generally to the public (of which its own affiliated ISP is a member). Accordingly, CLECs are "requesting carriers" under section 251(c)(3), using loops or the high frequency portion of the loop to provide "telecommunications service." If the ILECs choose not to provide retail telecommunications services based on DSL technology, that is their prerogative. But the ILECs' decision does not affect Covad's ability to purchase UNEs from the ILECs, including lineshared loops.

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Legislative history of the Act support this interpretation.

- “The term “network element” was included to describe the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that a local exchange carrier must provide for certain purposes under other sections of the conference agreement.”
 - P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996, SENATE REPORT NO. 104-230, February 1, 1996.
- “The term “telecommunications service” is defined as those services and facilities offered on a “common carrier” basis, recognizing the distinction between common carrier offerings that are provided to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services.”
 - P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996, SENATE REPORT NO. 104-230, February 1, 1996.



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**Covad's loop and
interoffice transport
advocacy in the
*Triennial Review***

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Loop Unbundling

A loop is a loop

- Regardless of the material it is made of, regardless of the customer served over it, and regardless of the speed of service offered over it, a loop is a bottleneck facility.
- If the Commission attempts to engineer limitations on what can be offered by CLECs over a bottleneck loop facility, it will be engineering a halt to innovation.
- The Commission's loop unbundling rules must continue to require unbundling of loops capable of offering any technically feasible telecommunications service, including all flavors of DSL.
- Any restriction on customer segment or speed of service over a loop flies in the face of the intent of the Act and the Commission's stated goal of encouraging the widest possible deployment of broadband services.
- No argument can be made that mandating the availability of loops harms innovation.

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Loop unbundling rules must be clear

- ILECs must be obligated to provide loops capable of supporting any technology presumed acceptable for deployment pursuant to the Commission's existing rules.
 - DSL-capable loops of all kinds.
 - DS-1 capable loops.
 - Lineshared loops.
- ILECs must be required to condition and de-condition loops to the extent technically feasible.
- Loop unbundling without specific provisioning obligation is meaningless. ILECs must be required to provide loops in 3 business days (standalone loops) and 1 business day (lineshared loops), pursuant to the Commission's UNE Performance Metrics NPRM.

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Loop Unbundling:

Remote Terminal-fed loops

Remote Terminal-fed loops

Loops are bottleneck facilities regardless of the material they are made of

- The Commission has properly concluded that the loop is a bottleneck facility -- impossible to duplicate -- whether it is made of copper, a mix of copper and fiber, or all fiber.
- Fiber-fed loops are the product of the most efficient voice network plant deployment -- ILECs use RT-delivered loops even in the absence of DSL.
- ILEC "upgrades" of RTs use existing copper, fiber, remote terminals, rights of way, etc. The only new addition to the loop is a new RT line card.
- Because RT-delivered loops must be unbundled, the only issue to resolve is how to price the "new" component of the loop -- the RT line card.
- Verizon Barr letter provides the roadmap.

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Verizon's July 16, 2002 Barr letter provides RT loop unbundling roadmap

- The question is not whether access should be granted (it should), but how to price the RT line cards.
- Verizon provides the details on how this can be handled within the existing TELRIC methodology:
 - “First the Commission should further clarify the appropriate calculation of the cost of capital.” Barr Letter at 2.
 - “Second, the Commission should further clarify the appropriate treatment of depreciation.” Barr Letter at 2.
- Covad agrees with Verizon that a broadband UNE is appropriate means of providing access to RT-delivered DSL-capable loops.
 - Question of how to price those loops is the proper purview of the state commissions, with guidance from the FCC on how to apply TELRIC.

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BOC arguments for elimination of RT collocation and sub-loop unbundling can only be accepted with the adoption of the Broadband UNE.

- BOCs are asking the Commission to eliminate RT collocation and sub-loop UNEs in order to insulate their “new investment” against unbundling.
 - The Commission has concluded since 1996 that all loops, including loops delivered through RTs, are bottleneck facilities that cannot be duplicated by competitors. Nothing on the record in this proceeding challenges that finding.
- The question is not whether RT-delivered loops should be unbundled -- it is the proper TELRIC price for attached electronics

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Interoffice Transport

Overview -- Interoffice Transport

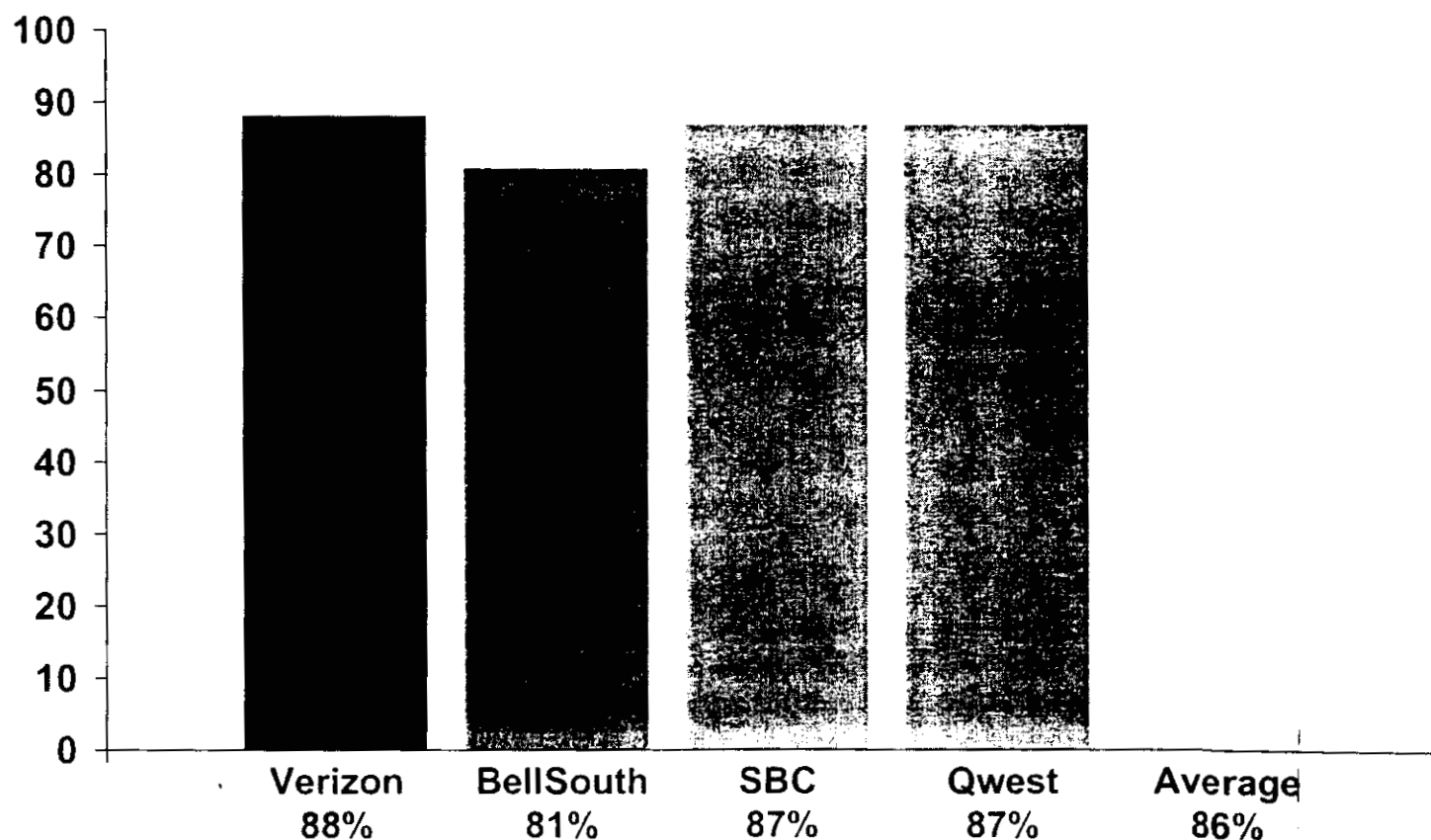
- True interoffice transport is part of the bottleneck transmission grid, just like loops.
- The Commission's findings as to interoffice transport in the *UNE Remand Order* are still valid.
- ILECs own "Fact Report" shows that 86% of ILEC COs have no competitive fiber provider collocated.
- ILECs provide not a *single example* of a true interoffice transport route that is actually served by CLEC transport.
 - The only data provided by ILECs is whether there is a collocated fiber CLEC -- no indication as to where the fiber goes. Most likely, to downtown office buildings, not to other central offices.
- Covad's network of collocated COs requires interoffice transport between all COs. Such transport is not available from CLECs.
- ILECs are confusing the issue between fiber loops and interoffice transport in order to sell more special access services.
- Determination of competitive interoffice transport is fact-specific and route-specific inquiry.
 - Where does the fiber go? Is it available to third parties?

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Percentage of ILEC COs without a single competitive fiber provider collocated

Source: UNE "Fact" Report at III-2.



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